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**BEFORE THE**
**UNITED STATES DEPARTMENT OF TRANSPORTATION**
**WASHINGTON, D.C.**

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| **In the matter of** | ) | |
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| | ) | |
| **COMPUTER** | ) | |
| **RESERVATION SYSTEMS (CRS)** | ) | **DOCKET OST-97-2881 -173** |
| **REGULATIONS** | ) | **DOCKET OST-97-3014 -42** |
| | ) | **DOCKET OST-98-4775 - 87** |
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# REPLY COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

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October 23, 2000

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**UNITED STATES DEPARTMENT OF TRANSPORTATION**
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# REPLY COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

On July 21, 2000 the Department of Transportation ("Department") issued a "Supplemental Advance Notice of Proposed Rulemaking" inviting comments on the Department's Computer Reservation System Regulations (14 C.F.R., Part 255). Comments were due by September 22, with reply comments due by October 23. The original comment period closed over two years ago. The Air Carrier Association of America ("ACAA") submits these comments to supplement comments filed on August 25, 2000. ACAA's original comments addressed a number of issues although the primary focus of those comments was on the immediate need to suspend Section 255.10(a), "Marketing and Booking Information."

**The Status of Competition**

In its July 24 Notice, the Department recounts the history of the current CRS review, which began eight years ago. The Department has postponed finalizing CRS rules three times since they expired. As part of its review of these issues, the Department has asked for comments on the need for CRS rules in light of industry developments. The July 24 notice states:

> The Department is issuing this supplemental advance notice...to address the impact of industry developments that have occurred since the comments were filed.

The change in the industry that mandates continuation and expansion of these rules is the ever-increasing concentration and consolidation of the nation's airlines. The nation's six largest carriers control approximately 84 percent of overall domestic market share. With Northwest's investment in Continental and United's proposal to purchase US Airways, we may soon have four carriers controlling much of the U.S. market.[1] New entrants control less than two percent of the national market share. Department studies show that at some hub airports, the primary carrier controls 80 to 90 percent of the airport's passengers.

New entry, which is becoming more and more difficult, is essential to the future of airline deregulation. Department officials have repeatedly acknowledged that new entry is key to industry competitiveness and that actions by some large carriers have been taken to halt the growth of competition.

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[1]

| | |
|---|---|
| 4 Large Carriers | 84.07 |
| Small Carriers | 14.44 |
| New Entrants | 1.49 |
| Total: | 100.00 percent |

When Secretary Slater announced his intention to issue anti-competitive guidelines, he stated:

> Our responsibility at the Department of Transportation is to ensure that every airline — large or small, new or established — has the opportunity to compete freely. That is what deregulation is supposed to be all about — a fair chance to compete.

The decline of new entry is far from being a good development for American travelers and communities. Fares continue to increase, particularly in markets with little or no new entry. ("Airlines raising prices yet again." USA Today, October 3, 2000.) There is little doubt that some large carriers are prepared to spend whatever it takes to expand control of markets and to block new entry.

Therefore, in response to the Department's question as to whether industry developments dictate action on this issue, the answer is yes! The Department should not allow dominant carriers to possess any tool that allows tracking and control of ticket sales and market share. It is immaterial as to whether CRS ownership has changed. Even if those CRS systems have moved away from airlines, CRS systems continue to be beholden to the nation's largest carriers and those running those systems continue to have strong ties to their former airline owners and employers. Moreover, CRS systems have historically been the source of anti-competitive activity. The Department must ensure that such conduct does not reoccur.

Therefore, the Department needs to move ahead with these proposals.

**Disclosure of CRS Data**

For the past decade, Department and GAO studies on competition have identified CRS abuses as a factor that inhibits competition and new entry.

As noted in ACAA's earlier comments, the Department's response to the Transportation Research Board report stated:

> To maintain hub domination, large carriers monitor the ticketing activities of travel agencies and major corporations utilizing information available pursuant to 14 CFR § 255.10(a).

At a hearing before the House Aviation Subcommittee (October 21, 1999), the Department released a report which stated:

> In our CRS rulemaking, we will investigate whether additional rules are needed to prevent airlines that dominate markets from using that dominance to deter travel agencies from booking customers on competitors.

The evidence shows that dominant airlines do utilize CRS data to deter travel agencies and corporations from booking on competitors.

ACAA's earlier comments asked for the **immediate suspension of 14 CFR § 255.10 (a).** There is no reasonable basis for a government regulation that allows large carriers to purchase data that discloses if one of its corporate customers has purchased even a small number of tickets from a new entrant carrier or if a travel agent has dared to sell a seat on a competitor. Because of the importance of this information in combating a new entrant's attempt to enter a hub, it makes that new entrant even more vulnerable to the onslaught of large carrier's anti-competitive practices.

ACAA's comments are supported by American Express, American Society of Travel Agents, Inc. (ASTA), National Business Travel Association (NBTA) and American Automobile Association (AAA). This rule change needs to be enacted immediately.

Under Section 255.10(a), each CRS:

> shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

Section 255.10 allows a dominant hub carrier to obtain information about other carrier's transactions including the class of service, price paid, date of purchase and route selected. The data also allows a large carrier to monitor travel agencies and corporations it has agreements with and already dominates. Although all carriers may have the opportunity to purchase the tapes, the purchase of this data by new entrant carriers is cost prohibitive. Moreover, the value of the data to new entrant carriers is limited. Because of the importance of this information in combating a new entrant's attempt to enter a hub, it makes that new entrant even more vulnerable to the onslaught of large carriers' anti-competitive practices. In enabling a large carrier to oversee the details of travel agency and corporate business transactions and to monitor who is utilizing a new entrant's service, the rule provides the dominant carriers with additional tools to eliminate lower fares and, ultimately, competition.

The CRS tapes under Section 255.10 provide travel agency booking data for specific dates including carrier(s), market (specific Origin & Destination, O&D), booking class, flight, time of flight, date of travel, date of ticketing, itinerary routing, point of origin, point of sale, travel agency location and travel agency Airline Reporting Company (ARC) number. The tapes are distributed daily and can be compiled within 3-days of bookings; in effect creating "real time" share. The shares of each airline can be calculated for a travel agency network, such as American Express, or for a specific agency location, such as World Travel Partners, Main Street, Knoxville, TN. This data is also effective in identifying and quantifying the support, or lack thereof, of travel

agencies in contested markets.[2] For example, if a travel agency is booking on a new entrant carrier, the incumbent carrier can identify the agency location and markets being effected and focus or intensify their sales and promotion efforts on those agencies. Market share data is also used to leverage corporate discount programs and agency commission override programs — if specific share hurdles are not met (or in the case of new entry, maintained) corporate discounts, overrides or other incentives may be withdrawn.

Changes in airline ownership do not change the ability of a carrier to utilize this information to attack any new entrant daring to enter a dominant carrier's market. At a time that concentration has reached historic levels, there is no reasonable basis for a government regulation to allow large carriers to obtain data that discloses if one of its corporate customers purchased a ticket from a competitor or if a travel agent has sold a seat on a competitor.

The only explanation proffered by a commenter asking that Section 255.10(a) remain unchanged was offered by Delta Airlines (Comments of September 25, 2000). Counsel for Delta was imaginative in pretending to state "legitimate" reasons for its use of CRS data. The focus of Delta's comments relate to "international route planning." Since there are few foreign competitors — three primary alliances — and even fewer new entrants, the "anti-competitive" use of this data in the international environment may not be as great as it is domestically.

Nevertheless, there is no legitimate basis for a large carrier to use CRS data for domestic purposes. For example, Delta claims it has a need to discover "market share."

[2] A dominant hub carrier knows whether its market share at a particular agency has slipped by even one percent.

In Cincinnati, Delta controls approximately 90 percent of the entire market. In Atlanta, it controls 75 percent. What markets and competitors does it want to monitor? Did it need CRS data to evaluate the Atlanta/Mobile market when AirTran entered that market? In response to Delta's comments, it is Delta that has refused to rebut the anti-competitive aspects of availability of CRS data. As America West notes, it is only the dominant carrier that can afford to routinely obtain and utilize CRS data.

On March 14, 2000, ASTA requested that the Department begin an expedited review of 14 CFR § 255.10, which directs CRS vendors to sell travel agency-generated transaction data that it generates from its CRS.

On April 12, 2000, American Express submitted comments to the docket that stated:

> Amex concurs with American Society of Travel Agents ("ASTA"), OST-2000-6984-5, that the Department should expedite its review of Section 255.10. This Section, which directs carrier-owned CRS vendors to provide sales and marketing data to all airlines, should be terminated at the earliest possible date. We made this point in our original comments filed in December 1997, OST-97-2881-33, but technology has advanced to such a degree since then that termination of this Section is now critical.
>
> When Section 255.10 was enacted, CRSs could only produce historical data, typically 60-90 days post flight, which the airlines would use for trend analysis and other acceptable purposes. Since then, technology has progressed to the point that today CRSs are producing and making available real time data. An airline can, thus, obtain up to the minute analysis of competitors' sales, market share and customer information, even on a *pre-flight* basis. A carrier, so disposed, is able to use this real time (and advance) data for predatory pricing, blocking new entrants from the marketplace, signaling and other anticompetitive activity. **What began as a tool to promote competition has become a weapon to eliminate it.**
>
> [emphasis added]

On April 14, 2000, ACAA joined ASTA in urging the Department to immediately begin a proceeding to bar CRS owners from providing such agency and corporation

specific transaction data to the nation's largest air carriers. To allow carriers that already dominate hub airports and entire regions of the country and the world access to the transaction data of their small competitors, a practice inconceivable in any other industry, is an obvious threat to the survival of competition.

The Department has heard from carriers, travel agencies, and corporations objecting to release of confidential data relating to their business practices. There is no public interest argument that requires release of this data. In response to the Department's notice, a number of commenters supported the need to immediately halt the sale of this CRS data. Those commenters stated:

> Also troublesome is the fact that, due to the fixed costs associated with purchasing the transaction data made available by section 255.10(a), dominant carriers are often the only ones able to afford this data from the CRS vendors. Similarly, the large carriers are better positioned to achieve the technical innovations necessary to take advantage of the data. This serves to further increase the competitive disparity between the large, established air carriers and the new entrant airlines.
>
> [Comments of America West Airlines, September 22, 2000, 15]

> AAA also agrees with the comments of others that it is appropriate for DOT to review section 255.10 of the regulations to determine whether it continues to serve a competitive purpose. In particular, AAA is concerned that the provision allows airlines significant control over their distributors, including travel agencies. To make the system more equitable, AAA suggests the Department consider whether written permission should be required from all sources or that the data be made available to all.
>
> [Comments of American Automobile Association, September 22, 2000, 4]

> NBTA believes the DOT should immediately suspend Section 255.10 because the regulation currently opens the door for carriers to monitor the ticketing activities of travel agencies and major corporations.
>
> > Under Section 255.10 each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking and sales data relating to carriers that it elects to generate from its system.

> Imagine going to buy a new car and the car salesman has already compiled your income, car preference, travel patterns and how much you can spend. You are left with little to no ability in regards to negotiating a favorable price for your new vehicle. This scenario sways the bargaining scales towards the seller, it compromises your privacy and it makes public your personal behavior patterns. That is what is happening to low-cost corporations under Section 255.10.
>
> NBTA believes that an exchange of information must occur with verification and approval of the corporations and carriers who would be directly impacted by its execution.
>
> Under Section 255.10, the corporation will have no control of how an airline uses their data and the proprietary nature of the data. The proposal will unmask the travel patterns and tendencies of corporations, allowing airlines, including ones a corporation is not contracted with, to sell and purchase a company's travel data.
> [Comments of the National Business Travel Association, September 21, 2000, 4-5]

If competition is going to survive, the Department must without delay stop the sale and use of CRS proprietary data. By taking this step, the Department will significantly advance the future of competition and deregulation.

**Need For Immediate Action**

There is little doubt that large carriers are using CRS information to destroy new entry and competition. Predatory behavior permeates throughout this industry. The use and possession of CRS transaction data is a matter that requires immediate attention by the Department. The Department asks whether there is an alternative to elimination of the rule. Assuming that there is a public interest in allowing a dominant carrier to purchase its own data, the ACAA recommends that Section 255.10(a) be amended as follows:

> **§ 255.10 Marketing and booking information.**
>
> (a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available

shall be as complete and accurate as the data provided a system owner. **The system shall not provide to any participating carrier data on another carrier unless that other carrier has provided written authorization for the system to release the data.**

Over the past year, the issues involved in this review have increased. In its supplemental notice, the Department has asked whether "we should adopt" any rules covering the distribution of airline services through the Internet. While the answer to that question is yes, the Department should not wait to issue a final rule on Section 255.10(a) until it has thoroughly reviewed **all** of the CRS issues. It is appropriate and necessary for the Department to immediately address some issues while continuing its review of other issues. Over 125 comments have been submitted in response to the various Department proposals. As noted above, several of the comments submitted to the various Department dockets have addressed the anti-competitive nature of Section 255.10(a).

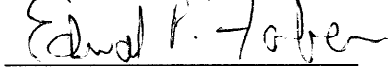
It is now time for the Department to terminate the rule that allows one carrier to purchase CRS transaction data involving another carrier unless that carrier approves the distribution of its data. The Department needs to put an end to the regulatory provision that enhances "anti-competitive" activity. All parties are aware that this issue needs to be addressed. There have been numerous statements signifying that this provision is under review. No party has submitted a comment defending Section 255.10(a).

In addition to taking this immediate action, the Department needs to accelerate its review of Internet ticket sale agreements and to address all CRS issues. If the Department is prepared to issue other final rules at this time, it should do so. While ACAA would prefer that the Department finalize comprehensive new CRS regulations, for a variety of reasons, the Department has been unable to complete that effort and may not be able to accomplish that objective until next year. In the interim, the Department

should not allow this anti-competitive weapon (Section 255.10(a)) to be aimed at new entrants. How many additional examples of new entrants being forced out of hub markets or new entrants admitting that they will not enter a hub market are needed before the Department agrees to take action?

The need to level the playing field has never been greater. By taking this small step, the Department will be promoting the future of deregulation, and will be supporting travelers and communities throughout the country. The Department should not put off for one more day the amendment of Section 255.10(a). Too much is at stake.

Respectfully submitted,



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October 23, 2000

## CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2000, a copy of the REPLY COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA was served upon the parties on the attached service list.

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